Nagarujun a/l Arjunan v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS A-O5(M)-490–10 OF 2018 AND A-O5(SH)-514–11 OF 2019
KAMALUDIN MD SAID, HADHARIAH SYED ISMAIL, MOHD SOFIAN JJCA
12 JANUARY 2021

Criminal Law — Murder — Circumstantial evidence — Whether totality of evidence pointed irresistibly to conclusion that accused committed the murder — Whether trial judge rightly admitted into evidence statement recorded from accomplice of accused under s 112 of the Criminal Procedure Code implicating accused in the murder — Whether trial judge was satisfied investigating officer did everything possible to locate accomplice to testify at the trial but without success — Whether prosecution had fulfilled requirements of s 32(1)(i) of Evidence Act 1950 ('the EA') to allow accomplice's statement to be admitted — Whether trial judge had also correctly admitted information given by accused to police under s 27 of EA which led to discovery of incriminating exhibits in the case

The appellants ('the accused') in the two appeals herein ('Nagarujun' and 'Devapraghasan') were jointly charged in the High Court with murdering a woman ('the deceased') when carrying out a burglary at her house early one morning in February 2015. Following a trial, the court found the accused guilty and sentenced Nagarujun, who was 19 years old when the offence was committed, to death while Devapraghasan, who was 16 years old at the time of the offence, was ordered under s 97 of the Child Act 2001 to be detained at the pleasure of the Sultan of Perak. The prosecution's evidence against the accused was circumstantial and was based largely on DNA profiling and fingerprint evidence and also a statement that was recorded by police from an accomplice named Naveen Raj. Information given by the accused as well as by Naveen Raj following their arrests led to the recovery of a coin box that was used by the deceased, a cellphone belonging to the deceased's son which the deceased had used and clothing belonging to the accused which contained traces of the deceased's blood. The deceased's blood was also found on a knife that was recovered from the kitchen sink of the deceased's house while a cup, also found in the kitchen sink, had the DNA and fingerprints of the accused. The post-mortem on the deceased showed that she had died of massive bleeding from multiple stab wounds to her neck. The accused claimed they were elsewhere at the time of the murder and had nothing to do with it. However, Naveen Raj, in his statement ('exh P128') to police under s 112 of the Criminal Procedure Code admitted that while he joined the accused to burgle the deceased's house, it was the accused who caused her death. He said that after they had entered the deceased's house through the back door, the accused

rushed into the deceased's bedroom. Thereafter, he saw Devapraghasan come to the kitchen to get a knife and then go back into the bedroom. After a while, the accused came out from the bedroom and went to the kitchen sink. That was when he saw blood on Devapraghasan's hands and on the knife he was holding. In the instant appeals against their conviction and sentence/order, the accused objected to the trial judge's admission of exh P128 under s 32(1)(i) of the Evidence Act 1950 ('the EA') and of information the accused had given to police during the course of investigations under s 27 of the EA which led to the discovery of various incriminating items connected with the case. Exhibit P128 was admitted because the trial judge was satisfied that the prosecution had done its best to locate Naveen Raj to testify at the trial, but without success. Devapraghasan complained that the failure of the investigating officer ('SP14') to investigate his alibi that he was at a cybercafé at the time of the murder had prejudiced him.

Held, unanimously dismissing the appeals and affirming the convictions and sentence/order:

(1) The trial judge admitted P128 as part of the prosecution's evidence after finding that the conditions under s 32(1)(i) of the Evidence Act 1950 had been met. The judge accepted SP14's evidence that she had diligently put in a great deal of effort to try and locate Naveen Raj to testify at the trial, but without success. In any event, the trial judge did not rely solely on exh 128 to convict but also on various other pieces of cogent and corroborative evidence such as the chemist's report, the DNA profiling and the fingerprint evidence (see paras 45, 53 & 55).

(2) This court agreed with the trial judge that the information given by the accused to the police that led to the discovery of the various incriminating exhibits in this case was admissible as it showed their involvement in the murder. It was not fatal to the prosecution's case that the police reports made in connection with the recovery of the exhibits were not made contemporaneously when the information was received but only after the incriminating items were found. This made sense because it would have been futile to make a report merely about the information received without discovery of the exhibit(s). In any case, the police reports were made within 24 hours from the time the exhibits were discovered. Also, there was no rule that information furnished by the accused to the police under s 27 of the Evidence Act must have been given voluntarily (see paras 68, 72–73 & 77).

(3) No adverse inference could be invoked against the prosecution for failure of the investigating officer, SP14, to investigate Devapraghasan's alibi notice. SP14 could not possibly have investigated whether Devapraghasan was at the cybercafé on the night of the incident because he had not given names and addresses in his notice of alibi which he was

A required to do under s 402A(4) of the Criminal Procedure Code to enable SP14 to have checked on the alibi. Based on the totality of the evidence in the case, the trial judge rightly found on balance of probabilities that Devapraghasan had failed to prove his alibi defence (see para 85).

B (4) The trial judge had correctly found that the circumstantial evidence in this case pointed to the irresistible inference and conclusion that the accused had murdered the deceased (see para 102).

C **[Bahasa Malaysia summary**

Perayu-perayu ('tertuduh') dalam dua rayuan di sini ('Nagarujun' dan 'Devapraghasan') dituduh bersama di Mahkamah Tinggi dengan membunuh seorang wanita ('si mati') ketika melakukan pecah masuk di rumah si mati pada satu pagi pada Februari 2015. Selepas perbicaraan, mahkamah mendapati
D tertuduh bersalah dan menjatuhkan hukuman mati terhadap Nagarujun, yang berusia 19 tahun ketika kesalahan itu dilakukan, sementara Devapraghasan, yang berusia 16 tahun pada masa kesalahan itu, diperintahkan di bawah s 97 Akta Kanak-kanak 2001 untuk ditahan atas titah Sultan Perak. Bukti pihak pendakwaan terhadap tertuduh bersifat tidak langsung dan sebahagian
E besarnya berdasarkan pada profil DNA dan bukti cap jari dan juga pernyataan yang dirakam oleh polis dari rakannya bernama Naveen Raj. Maklumat yang diberikan oleh tertuduh dan juga oleh Naveen Raj berikutan penangkapan mereka membawa kepada pemulihan kotak duit syiling yang digunakan oleh si mati, telefon bimbit milik anak si mati yang telah digunakan oleh si mati dan
F pakaian milik tertuduh yang terdapat darah si mati. Darah si mati juga dijumpai pada pisau yang ditemui dari sink dapur rumah si mati sementara cawan, juga dijumpai di sink dapur, mempunyai DNA dan cap jari tertuduh. Bedah siasat ke atas si mati menunjukkan bahawa dia telah mati akibat pendarahan besar dari beberapa luka tikaman ke lehernya. Tertuduh
G mendakwa mereka berada di tempat lain ketika pembunuhan itu dan tidak ada kaitan dengan pembunuhan tersebut. Akan tetapi, Naveen Raj, dalam pernyataannya ('eksh P128') kepada polis di bawah s 112 Kanun Tatacara Jenayah mengakui bahawa semasa dia bersama dengan tertuduh untuk pecah masuk rumah si mati, tertuduh yang menyebabkan kematiannya. Dia
H mengatakan bahawa setelah mereka memasuki rumah si mati melalui pintu belakang, tertuduh bergegas masuk ke bilik tidur si mati. Selepas itu, dia melihat Devapraghasan datang ke dapur untuk mendapatkan pisau dan kemudian kembali ke bilik tidur. Selepas beberapa ketika, tertuduh keluar dari bilik tidur dan pergi ke sinki dapur. Ketika itulah dia melihat darah di tangan
I Devapraghasan dan pisau yang dipegangnya. Dalam rayuan segera terhadap sabitan dan hukuman/perintah terhadap mereka, tertuduh membantah pengakuan hakim perbicaraan berkenaan ekshibit P128 di bawah s 32(1)(i) Akta Keterangan 1950 ('AK') dan maklumat oleh tertuduh kepada polis semasa menjalankan siasatan di bawah s 27 AK yang membawa kepada

penemuan pelbagai barang yang berkaitan dengan kes tersebut. Ekshibit P128 diterima kerana hakim perbicaraan berpuas hati bahawa pihak pendakwaan telah melakukan yang terbaik untuk mengesan Naveen Raj untuk memberi keterangan pada perbicaraan, namun gagal. Devapraghasan mengadu bahawa kegagalan pegawai penyiasat ('SP14') untuk menyiasat alibinya bahawa dia berada di sebuah kafe siber pada masa pembunuhan itu telah memprejudiskannya.

Diputuskan, secara sebulat suara menolak rayuan dan mengekalkan sabitan dan hukuman/perintah:

(1) Hakim perbicaraan mengakui P128 adalah sebagai sebahagian daripada bukti pendakwaan setelah mendapati syarat di bawah s 32(1)(i) Akta Keterangan 1950 telah dipenuhi. Hakim tersebut telah menerima bukti SP14 bahawa dia dengan bersungguh-sungguh melakukan usaha yang banyak untuk cuba mencari Naveen Raj untuk memberi keterangan semasa perbicaraan namun gagal. Walaubagaimanapun, hakim perbicaraan tidak hanya bergantung pada eksh 128 untuk mensabitkan kesalahan tetapi juga pada pelbagai bukti lain dan bukti yang boleh disahkan seperti laporan ahli kimia, profil DNA dan bukti cap jari (lihat perenggan 45, 53 & 55).

(2) Mahkamah ini setuju dengan hakim perbicaraan bahawa informasi yang diberikan oleh tertuduh kepada polis yang menyebabkan penemuan berbagai ekshibit yang memberatkan dalam kes ini dapat diterima kerana menunjukkan keterlibatan mereka dalam pembunuhan tersebut. Tidak memberikan kesan yang serius kepada kes pendakwaan bahawa laporan polis yang dibuat sehubungan dengan pemulihan barang-barang yang diekshibitkan tidak dibuat secara serentak ketika maklumat itu diterima tetapi hanya setelah barang-barang yang memberatkan kes itu dijumpai. Perkara ini boleh diterima kerana ia akan menjadi sia-sia dengan membuat laporan hanya berdasarkan maklumat yang diterima tanpa penemuan ekshibit. Bagaimanapun, laporan polis dibuat dalam masa 24 jam dari ekshibit ditemui. Tidak ada peraturan bahawa maklumat yang diberikan oleh tertuduh kepada polis di bawah s 27 Akta Keterangan mesti diberikan secara sukarela (lihat perenggan 68, 72–73 & 77).

(3) Tidak ada kesimpulan yang merugikan terhadap pendakwaan terhadap kegagalan pegawai penyiasat, SP14, untuk menyiasat pemberitahuan alibi Devapraghasan. SP14 tidak mungkin dapat menyiasat sama ada Devapraghasan berada di kafe siber pada malam kejadian kerana dia tidak memberikan nama dan alamat dalam notis alibi yang dia sepatutnya lakukan di bawah s 402A(4) Kanun Tatacara Jenayah untuk membolehkan SP14 telah memeriksa alibi tersebut. Berdasarkan keseluruhan bukti dalam kes tersebut, hakim perbicaraan dengan tepat berpendapat dengan kebarangkalian kemungkinan bahawa

Devapraghasan gagal membuktikan pembelaan alibinya (lihat perenggan 85).

(4) Tidak ada kesimpulan yang merugikan terhadap pendakwaan terhadap kegagalan pegawai penyiasat, SP14, untuk menyiasat pemberitahuan alibi Devapraghasan. SP14 tidak mungkin dapat menyiasat sama ada Devapraghasan berada di kafe siber pada malam kejadian kerana dia tidak memberikan nama dan alamat dalam notis alibi yang dia sepatutnya lakukan di bawah s 402A(4) Kanun Tatacara Jenayah untuk membolehkan SP14 telah memeriksa alibi tersebut. Berdasarkan keseluruhan bukti dalam kes tersebut, hakim perbicaraan dengan tepat berpendapat dengan kebarangkalian kemungkinan bahawa Devapraghasan gagal membuktikan pembelaan alibinya (lihat perenggan 85).]

Cases referred to

Amuthavalli a/p Andiappan v PP [2019] MLJU 766; [2019] 1 LNS 1098, CA (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307 (refd)
Chong Soon Koy v PP [1977] 2 MLJ 78, FC (refd)
Francis Anthonysamy v PP [2005] 3 MLJ 389, FC (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507; [1999] 1 CLJ 829, FC (refd)
Hasamuddin bin Talena v PP [2002] 2 MLJ 408; [2002] 2 CLJ 504, CA (refd)
Inspector General of Police v Alan Noor bin Kamat [1988] 1 MLJ 260, SC (refd)
Leong Hong Khie v PP [1986] 2 MLJ 206, FC (refd)
Mohamad Zul Shahril bin Suhaimi v PP and other appeals [2017] MLJU 274; [2017] 1 LNS 283, CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 MLJ 617, FC (folld)
PP v Nolose Albert Raleshome [2016] 7 MLJevi 17, FC (refd)
PP v Oh Laye Koh (1994) 2 SLR 385, SC (refd)
SP Rajnath a/l K Saudrapandian dan satu lagi lwn Pendakwa Raya [2017] MLJU 1237; [2017] 1 LNS 1223, HC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Yeap Boon Hai v PP [2009] 5 MLJ 406; [2010] 2 CLJ 388, CA (refd)

Legislation referred to

Child Act 2001 s 97(2)
Criminal Procedure Code ss 112, 302, 399, 402A(4)
Evidence Act 1950 ss 27, 32, 32(1)(i), 91, 92
Penal Code ss 34, 300(c)

Appeal from: Criminal Trial No WA-45B-04–11 of 2015 (High Court, Ipoh)

Mathews Jude (Naran Singh & Co) for the appellants.
Nurul Farhana bt Khalid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohd Sofian JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two separate appeals before this court emanating from the decision of the High Court dated 27 September 2018, namely:

(a) the first appeal is by Nagarujun a/l Arjunan in Criminal Appeal No A-05(M)-490–10 of 2018; and

(b) the second appeal is by Devapraghasan a/l Saravanan in Criminal Appeal No A-05(SH)-514–11 of 2019.

[2] Both appellants were charged and tried in the High Court at Ipoh for the murder of one Izaah bt Abdullah. The charge reads as follows:

> Bahawa kamu bersama-sama pada 11.2.2015 jam antara 12.30 pagi hingga 2.00 pagi bertempat di No. 9, Laluan Tanjong 4, Taman Tanjong Emas, 31150, Ulu Kinta, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan sehingga menyebabkan kematian IZAAH BINTI ABDULLAH (NO. KP: 630409-08-5764) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah seksyen 302 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

[3] At the conclusion of the trial, the learned trial judge found both the appellants guilty on the said charge. The appellant in the first appeal, Nagarujun a/l Arjunan, was sentenced to death by hanging while the appellant in the second appeal, Devapraghasan a/l Saravanan, was sentenced pursuant to s 97(2) of the Child Act 2001 to be detained at the pleasure of the His Royal Highness ('HRH') of the Ruler of the State of Perak.

[4] Aggrieved with the conviction and sentence, the appellants appealed to this court and we heard both appeals on the 27 August 2019. At the conclusion of the submission, we find no merit and dismissed both appeals. We now provide our reasons for the decision.

[5] For ease of reference, parties will be referred to as they were in the proceedings before the High Court as follows:

(a) Nagarujun a/l Arjunan in the first appeal is the second accused;

(b) Devapraghasan a/l Saravanan in the second appeal is the first accused; and

(c) respondent in both appeals is the prosecution.

THE PROSECUTION'S CASE

[6] The prosecution's case was established by the evidence of its witnesses and accepted by the learned trial judge. A total of 15 witnesses were called by the prosecution. The gist of the facts of the case for the prosecution gathered from these witnesses may be summarised as follows.

[7] Zulfadhli bin Sallehuddin ('SP8') is the only child of the deceased who works at Jabatan Kesihatan Perak and runs a business with his friend named Rizal at night market. On 11 February 2015, the night of the murder, SP8 left the house at about 8.30pm and the deceased was alone in the house. His father, SP7, is a highway traffic police and was not at home. After SP8 had finished at the night market, he went to meet his friends until 2.45am and returned home at 3.15am. When he arrived at home, he opened the grill and then he realised the door was unlocked. The grill was normally locked by the deceased.

[8] As he entered the house, the alarm clock rang. SP8 called out the deceased from the living room but there was no respond. He saw that the door of the deceased's room was partially opened. He went inside the room and switched on the light. When the light was on, SP8 saw the deceased lying downward on the bed with her head covered with a pillow. He lifted the pillow and saw traces of blood on the deceased's neck. He called the deceased's name but there was no respond.

[9] SP8 who was in the state of shock rushed out of the room calling Rizal who was outside the house and shouted him to come inside the house. Before entering the house, SP8 told Rizal what had happened to the deceased. SP8 then asked Rizal to make a police report while SP8 went out from the house to call for help from the neighbours. At the same time, SP8 called SP7 and told him what had happened to the deceased.

[10] Rizal went to the Kaunter Pertanyaan Balai Polis Tanjung Rambutan at about 3.30am to make a police report of a burglary at the deceased's house. Koperal Siti Maziah bt Osman ('SP5'), who was on duty attended to Rizal and she prepared the first information report ('FIR') (exh P9).

[11] SP5 immediately informed the officer in charge of the police station and also the officer in charge of the crime scene investigation. SP5 was also instructed to inform the senior investigating officer on duty namely, ASP Nirmala a/p Arumugam (SP14).

[12] Upon been informed of the report, SP14 had called:

(a) ASP Noraini bt Awang (SP12) from Cawangan Forensik IPK, Perak to conduct a forensic investigation; and

(b) KPL Jamil bin Osman, a photographer from IPD Ipoh to take photographs at the crime scene.

[13] SP14 arrived at the deceased's house at about 3.45am. From her initial investigation, SP14 found out that the deceased had stayed at the said house since last seven years with her son, SP8. The deceased's husband, SP7, only come back home when he is on leave. After SP7 received a call from SP8, he rushed home. He fainted when he saw the deceased and regained his consciousness when the police arrived. SP7 had confirmed that the coin box (exh P30) placed next to the deceased's bed and her handphone (exh P32) were missing.

[14] ASP Noraini bt Awang (SP12) who was the crime scene forensic officer, at the material time, together with four police personnel were assigned to collect evidence at the crime scene namely fingerprint uplifting and DNA profiling. SP12 arrived together with her team at the deceased's house at about 5am on the same morning of the incident. SP12 concluded their forensic investigation at about 11.30am the same day. The exhibits retrieved and handed over to SP14, inter alia, were as follows:

(a) a knife in a kitchen sink (exh P89B);

(b) a brown cup at a kitchen sink (exh P56B);

(c) a blue cup at a kitchen sink (exh P58B); and

(d) a drink cans with writing Monster Energy Drink (exh P59B).

[15] SP12 had also taken swab DNA from exhs P56B and P59B which was suspected to have saliva and fingerprints.

[16] The fingerprints were analysed by Ngsman bin Saring (SP6), the Assistant Registrar of Criminals, Bukit Aman. According to SP6, from his analysis on the 14 specimen cards of fingerprint uplifting, only one specimen card fingerprint uplifting matched with the fingerprint of the second accused. SP6 prepared a report as in the exh P13.

[17] ASP Mohd Akmal Hizam bin Hj Abdul Khupur (SP9) was assigned to trace the suspects in this case. SP9 had arrested the first accused on the same day at the side of the road at Tanjung 3, Taman Tanjung Emas Batu 8, Ulu Kinta. Based on the information provided in the course of investigation by the first accused, led to the arrest of the second accused and another person named Naveen Raj at the address of No 8, Persiaran Bercham Utara 8, Taman Ramai,

Ipoh, Perak. From the information given by the second accused and Naveen Raj, led to the arrest of Thivarasan a/l Mohan (SP10).

[18] Information given by the accused in the course of investigation led to the discovery of the following exhibits, namely:

(a) a coin box (exh 30), which was based on the information given by the first accused;

(b) a handphone (exh 31), which was based on the information given by the second accused;

(c) a shirt (exh P96A) and a pant (exh P98B) worn by the first accused; and

(d) a pant worn by the second accused (exh P41).

[19] Based on the DNA analysis on the blood sample of first and second accused, the chemist, Nor Ummiza bt Kamaruzaman (SP11) confirmed the following:

(a) the traces of blood found on the shirt (exh P96A) and pant (exh P98B) worn by the first accused were the blood of the deceased; and

(b) the traces of blood found on the pant worn by the second accused (exh P41) was the blood of the deceased.

[20] The post mortem on the deceased was done by Dr Siti Zanariah bt Md Nazri (SP2), a pathologist at Hospital Raja Permaisuri Bainun Ipoh, Perak, at 9.30am on 11 February 2020. In her report (exh P6), SP2 concluded that the cause of death was due to excessive bleeding from multiple stab wounds inflicted on her neck.

[21] The first accused in his notice of alibi dated 23 October 2017 (exh D121) claimed that he was at the cybercafe named EQ Max Video Centre at the time the offence was committed.

[22] The second accused denied that he was at the crime scene at the time of the murder. He said that he was at his uncle's house together with his cousin, Neevan Raj. The second accused claimed that he went to work at 6pm. At 9.30pm, the first accused together with SP10 and Neevan Raj came to his work place. They had dinner at the restaurant situated in front of his work place. After dinner, they went to a nearby field and remain there until 10.30pm. The second accused walked and arrived home at about 11.30pm. While Naveen Raj remain with the first accused and SP10.

FINDING OF THE LEARNED TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[23] At the end of the prosecution case, the learned trial judge embarked on a maximum evaluation of the evidence of the prosecution's witnesses to determine the ingredients of s 302 of the Code had been proven or otherwise. The learned trial judge stated the basic ingredients which prosecution needs to prove as follows:

(a) that the deceased was the named person as stated in the charge;

(b) that the deceased died due to the injuries inflicted on her;

(c) that the death is caused with intention of causing bodily injury to the deceased by the first and second accused which in the ordinary course of nature to cause death (which the prosecution refer to s 300(c) of the Penal Code);

(d) that the act of causing bodily injury is caused by the first and second accused; and

(e) that the offence was committed in furtherance of their common intention pursuant to s 34 of the Penal Code.

[24] In arriving at this decision at the close of the prosecution's case, the learned trial judge made his findings of fact that:

(a) the pathologist (SP2) gave detail evidence of the injuries suffered as well as the probable causes of death of the deceased in which the pathologist stated that the deceased had suffered multiple injuries from stab wounds on her neck. The pathologist concluded that the cause of death was the stab wounds on her neck, which would cause excessive bleeding;

(b) the pathologist also stated that the wounds were inflicted with sharp, flat and tapered object. This was consistent with the knife which was found in the kitchen sink. After the analysis of DNA profiling by SP11, it was confirmed that the knife was covered with the blood of the deceased; and

(c) there was no eye witness who saw the first and second accused committed the offence, however the prosecution was relying on circumstantial and forensic evidence of DNA profiling, fingerprint report and statement by Naveen Raj that the first and second accused had entered the house and committed the offence of murder.

[25] It was the finding of the learned trial judge that the first and second accused had inflicted the injuries and must have intended to cause bodily injury to the deceased which in the ordinary course of nature to cause death.

[26] On the element of common intention, it can form spontaneously at the time the offence is to be committed. In the case of *Mohamad Zul Shahril bin Suhaimi v Public Prosecutor and other appeals* [2017] MLJU 274; [2017] 1 LNS 283, the Court of Appeal held that 'the existence of common intention is a question of fact to be proved mainly as a matter of inference from the surrounding circumstances of the case'. And the court further stated that 'pre-concert or pre-arrange plan may develop on the spot or during the course of the commission of the offence and common intention can be formed previously or in the course of occurrence of the crime and a spur of the moment'.

[27] From the evidence of SP10, it showed that the second accused had never protested to the first accused's plan to break into the deceased's house. The second accused did not deny that he committed the offence together with the first accused. The second accused was with the first accused at the time the deceased was stabbed. The blood stain of the deceased was also found on the first accused's shirt and pant. This shows that the first and second accused had a common intention in committing the offence.

[28] The learned trial judge found a prima facie case had been established by the prosecution and ordered the first and second accused to enter their defence.

DEFENCE

[29] The first and second accused gave their evidence on oath.

[30] The first accused in his defence claimed that he was not arrested by SP9 but was arrested by the police from Balai Tanjung Rambutan. He also claimed that he worked with the deceased as a cleaner at her homestay. He said that he went to the deceased's house to ask for his salary but was refused by the deceased. The deceased had given him a coin box and promised to pay his salary on the next day.

[31] The first accused went on motorbike to meet his friend and had burger with them. Thereafter his went home and left his motorbike at home. He then walked to the cybercafe and on his way, he took the money from the coin box and threw the coin box at the side of the road. The first accused was at the cybercafe until 5am in the morning of the incident. He had filed a notice of alibi but this alibi was not supported by any evidence.

[32] The first accused also claimed that he was beaten by the police at the arrest and had been forced to admit the offence. There was no evidence to support this allegation.

[33] The second accused claimed that he lived in Skudai, Johor Bahru, Johor. In January 2015, he went and stayed with his uncle at Taman Ramai, Bercham together with his cousin, Naveen Raj. He said that on 10 February 2015 at 6pm he went to work at the Chinese restaurant. As he was working, his friend came and invited him out for dinner at a nearby restaurant. After dinner, the went to a nearby field. He went home walking and arrived at 11.30pm. After taking a bath, he went to bed. At about 6am in the morning, he was arrested by the police.

[34] The second accused claimed that he neither met the deceased nor went to the deceased's house.

Finding of the trial learned judge at the end of the defence's case

[35] At the conclusion of the trial, it was the finding of the learned trial judge that the defence had failed to cast a reasonable doubt on the prosecution's case. Consequently, the learned trial judge convicted the first and second accused for the offence as per the charge.

[36] The learned trial judge, in coming to his decision, held that the evidence by the defence must be evaluated together with the evidence adduced by the prosecution before the court can decide as whether the defence had succeeded to cast a reasonable doubt. From the totality and entirety of the evidence, when combined, lead to one conclusion that the first and second accused had committed the offence of murder of the deceased. Among the evidence are as follows:

(a) from the statement of SP12, it shows that there is a DNA of the first accused and the fingerprints of the second accused on the brown cup (exh P56B);

(b) from the statement of SP12, it shows that:

(i) the information given by the first and second accused lead to the discovery of the coin box (exh P30) belongs to the deceased and handphone (exh P31) belongs to SP8; and

(ii) there are traces of blood found on the shirt (exh P96A) and pant (exh P98B) which belong to first and second accused and no evidence was tendered to rebut this.

[37] Hence, the first and second accused were found guilty and the first accused been a child according to the Child Act 2001 was sentenced pursuant to s 97(2), to be detained at the pleasure of HRH Sultan of Perak whereas the second accused was sentenced to death by hanging.

A THIS APPEAL

[38] The first accused had eight grounds in his petition of appeal which are as follows:

B 1) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila membuat keputusan bahawa, pihak pendakwaan berjaya membuktikan suatu kes prima facie sedangkan pendakwaan gagal membuktikan intipati-intipati pertuduhan pendakwaan gagal membuktikan intipati-intipati pertuduhan.

C 2) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila menerima masuk percakapan Naveen Raj dan bergantung kepada percakapan beliau untuk sabit Perayu.

D 3) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila gagal memberi amaran untuk diri sendiri, bahawa Naveen Raj adalah seorang rakan sejenayah dan keterangan beliau diambil kira secara was-was dan perlu keterangan sokongan.

E 4) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila gagal mengambil kira bahawa Perayu-Perayu telah diprejudis, kerana perbicaraan mereka didengar oleh tiga (3) orang Hakim berlainan, dan mereka tidak dapat menilai demeanor dan kredibiliti saksi-saksi

F pendakwaan.

5) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila gagal meneliti pembelaan secara terperinci dan Perayu telah diprejudis.

G 6) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila mengambilkira keterangan seksyen 27 Akta Keterangan yang tidak mengikut prinsip undang-undang dan Perayu telah diprejudis.

7) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan

H kes terkhilaf dari segi undang-undang dan fakta kes apabila gagal mengambil kira Notis Alibi Perayu dan juga kegagalan pihak pendakwaan untuk menyiasat Notis Alibi tersebut telah memprejudiskan Perayu bicara yang adil.

8) Keputusan Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar

I kes, adalah bertentangan dengan keterangan yang sedia ada di Mahkamah.

[39] Meanwhile, the second accused had seven grounds in his petition of appeal which are as follows:

(1) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila membuat keputusan bahawa, pihak pendakwaan berjaya membuktikan suatu kes prima facie sedangkan pendakwaan gagal membuktikan intipati-intipati pertuduhan.

(2) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila menerima masuk percakapan Naveen Raj dan bergantung kepada percakapan beliau untuk sabit Perayu.

(3) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila gagal memberi amaran untuk diri sendiri, bahawa Naveen Raj adalah seorang rakan sejenayah dan keterangan beliau diambil kira secara was-was dan perlu keterangan sokongan.

(4) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila gagal mengambilkira bahawa Perayu-Perayu telah diprejudis, kerana perbicaraan mereka didengar oleh tiga (3) orang Hakim berlainan, dan mereka tidak dapat menilai demeanor dan kredibiliti saksi-saksi pendakwaan.

(5) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila gagal meneliti pembelaan secara terperinci dan Perayu telah diprejudis.

(6) Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar perbicaraan kes terkhilaf dari segi undang-undang dan fakta kes apabila mengambil kira keterangan seksyen 27 Akta Keterangan yang tidak mengikut prinsip undang-undang dan Perayu telah diprejudis.

(7) Keputusan Yang Arif Tuan Hakim Mahkamah Tinggi yang mendengar kes, adalah bertentangan dengan keterangan yang sedia ada di Mahkamah.

OUR DECISION

[40] Both the appeals are interrelated with two separate appeals and petition of appeals filed by the first and second accused respectively. However, at the outset of the hearing, learned counsel for the first and second accused had informed the court that in gist there are only two common issues for both appeals and one issue for each appeal respectively.

[41] The common issues for both appeals are as follows:

(a) the admissibility of exh P128 being the statement by Naveen Raj pursuant to s 32(1)(i) of the Evidence Act 1950; and

(b) information pursuant to s 27 of the Evidence Act 1950 leading to

discovery of exhibits namely, P9(A), P18, P20, P21, P22 P23, P30, P32, and P98(B).

[42] The separate issues are as follows:

(a) for the first accused, (Devapraghasan a/l Saravanan) it relates to the failure by the investigating officer, SP14 to investigate the alibi notice issued by him; and

(b) for the second accused, (Nagarujun a/l Arjunan), it relates to the corrective report pursuant to s 399 of the Criminal Procedure Code ('the CPC') by SP6 with regard to the finger-print report which is contrary to ss 91 and 92 of the Evidence Act 1950.

[43] We shall deal with the issues in *seriatim.*

The first common issue on the admissibility of exh P128 being the statement by Naveen Raj pursuant to s 32(1)(i) of the Evidence Act 1950

[44] It is not disputed that Naveen Raj was arrested by SP9 at a house No 8, Persiaran Bercham Utara 8, Taman Ramai, 31150, Ipoh, Perak together with the second accused. In the course of police investigation, Naveen Raj had given a statement under s 112 of the CPC. In the said statement Naveen Raj did not deny that the first and second accused and himself have committed burglary at the deceased's house but denied that he had the intention to cause bodily injury to the deceased which in the ordinary cause of nature to cause death. In the said statement Naveen Raj had implicated both the first and second accused as the persons whom had inflicting bodily injury on the deceased which led to her death.

[45] The prosecution could not call Naveen Raj as a prosecution witness at the trial as he could not be traced. The prosecution however wanted to tender Naveen Raj's statement but was objected to by learned counsel as the prerequisite to s 32(1)(i) of the Evidence Act 1950 had not been satisfied by the prosecution.

[46] For ease of reference we reproduce s 32(1)(i) of the Evidence Act which states as follows:

> Statements by persons who cannot be called as witnesses.
>
> 32 Cases in which statement of relevant of fact by person who is dead or cannot be found, etc. is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under

the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:

(i) when the statement was made in the course of, or for the purposes of, an investigation on their part relevant to the matter in question.

[47] The learned counsel was of the view that the prosecution has not satisfied the condition precedent as envisaged in s 32(1)(i) of the Evidence Act. It is submitted that the prosecution has not satisfied that Naveen Raj could not be found or that his attendance could not be procured, without an amount of delay or expenses. There was no diligent search and reasonable exertion were made to procure the witness.

[48] Learned counsel referred to *Amuthavalli a/p Andiappan v Public Prosecutor* [2019] MLJU 766; [2019] 1 LNS 1098 where this court held as follows:

[34] In any event, it is also our considered view that these statements could not have been admitted as evidence for the simple reason that the pre-condition of Section 32(1) of the Evidence Act, was not fulfilled. It is trite law that before the court could admit the statement of witness as evidence under Section 32(1) of the Evidence Act, the condition precedent contemplated under the section must be satisfied. The condition precedent the prosecution ought to satisfy in the present case was either to prove that the witnesses could not be found or that their attendance could not be procured, without an amount of delay or expenses. Where no diligent search and reasonable exertion were made to procure the witnesses, the court could not come to a finding that the witnesses could not be found and therefore their statements could not be admitted under the section. Mere ignorance of the whereabouts of the witnesses is not sufficient to invoke the section. It stands to reason that unless stringent conditions are prescribed and fulfilled, the established rule against the reception of hearsay evidence would be eroded; courts would have to accept as evidence statements which may not stand the vigour of cross-examination had the makers been called to give evidence.

[49] The learned trial judge observed that in the instant case, a warrant of arrest was issued at the request of the prosecution on Naveen Raj. Apart from that, Naveen Raj's name has been placed in the wanted list. In order to execute the warrant of arrest, SP14, the investigating officer (ASP Nirmala a/p Arumugam) had instructed her personnel to locate Naveen Raj at addresses No 8 Persiaran Bercham Utara 8, Taman Ramai, 31150, Ipoh, Perak and also at No 2 Persiaran Ulu Bercham 6, Bandar Baru Putra, 31400, Ipoh, Perak. Nine attempts to trace and arrest Naveen Raj at both the addresses were made but without success. SP14 had also cause to publish in the Facebook of the IPD Ipoh appealing to the public for information on whereabouts of Naveen Raj. SP14 had also written to the Foreign Workers section of the Ministry of Home Affairs for particulars of Naveen Raj whether he was still in the country or had left the country. SP14 had also contacted the local media namely the Chinese

daily to state that Naveen Raj was required as a witness at the trial. The police could not contact the Telcos because no hand phone numbers were available.

[50] Naveen Raj was also listed as a witness for the prosecution and had attended court on numerous occasions but before his turn to be called as a witness came, he bolted out and could not be traced. No positive information on the whereabouts of Naveen Raj was available to SP14.

[51] On this issue, this court had in *SP Rajnath a/l K Saudrapandian dan satu lagi lwn Pendakwa Raya* [2017] MLJU 1237; [2017] 1 LNS 1223 held that s 32(1)(i) of the Evidence Act 1950 is the exception to the hearsay rule. This is because the admissibility of the statement is done without the presence of the witness who made the statement being cross-examined.

[52] In *Leong Hong Khie v Public Prosecutor* [1986] 2 MLJ 206, the Federal Court had this to say:

> The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principles of the law of evidence. To quote *Lord Normand in Teper v R* (1952) AC 480; 486:
>
> > The rule against the admission of hearsay evidence is fundamental. It is not the best evidence, and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost.

The Federal Court had also stated that there is a danger that hearsay evidence may be concocted, fabricated and tailored to suit the witness's testimony. Notwithstanding this general rule certain exceptions have been recognised upon the ground of necessity or convenience. In Malaysia, this exception are set out in s 32 of the Evidence Act 1950.

[53] It is our judgment, the learned trial judge had evaluated and accepted the evidence of SP14 that she had shown diligence and had put in a great deal of effort in locating and tracing Naveen Raj as a witness for the prosecution. In our view, the admissibility of Naveen Raj's statement as an exh P128 and also as part of the prosecution evidence was made after the trial judge was satisfied that the condition precedent as set out in s 32(1)(i) of the Evidence Act 1950 has been met.

[54] In exh P128, Naveen Raj had stated that the first and second accused had entered the deceased's house by breaking in through the back door. Once inside the house, both the first and second accused had rushed into the

deceased's bedroom. The first accused then went to the kitchen grabbed a kitchen knife (P89B) while the second accused was still in the deceased's bedroom. The first accused entered the deceased's bedroom and later Naveen Raj heard the sound 'Ehhhh Ehhhh' from inside the said room and then it was quiet. Thereafter the first and second accused came out from the deceased's bedroom to where Naveen Raj was at the kitchen sink. Naveen Raj saw the first accused holding the kitchen knife with blood stains on it and also on the first accused's hand. The first accused had told Naveen Raj that he had stabbed the deceased repeatedly on the neck.

[55] In our judgment, the learned trial judge did not rely entirely on exh P128 but had also relied on other cogent evidence such as the chemist report prepared by SP11 on the DNA profiling on the blood sample on the shirt (exh P96A) and pants (exh P98B) worn by the first accused which matched with the deceased's blood sample and the finger-print uplifting on the brown cup (exh P56B) belonged to the second accused as confirmed by SP6. The blood profiling on the second accused pants (exh P41) matched with the blood sample of the deceased. There are other corroborative evidence which was considered by the learned trial judge. It would be otherwise if the learned trial judge had relied solely on exh P128 to form his finding.

The second common issue on information obtained pursuant to ss 27 and 8 of the Evidence Act 1950 leading to discovery of incriminating exhibits

[56] The learned counsel submitted that the learned trial judge had erred in law and fact in accepting the evidence of SP9 that the first and second accused and Naveen Raj had furnished the information as to the whereabouts were the exhibits. The information furnished by the accused and Naveen Raj was in the course of investigation by SP9.

[57] On 11 February 2015, at about 8.15am, Naveen Raj had agreed to show SP9 the exhibits stolen from the deceased's house and also the clothes he wore on the night of the robbery. SP9 then made a police report for the said discovery which is marked as exh P20. At about 8.25am the same day, the second accused had allegedly informed SP9 with regard to the clothes he wore on the night of the robbery, SP9 then made a police report for the said discovery which is marked as exh P21. Based on information furnished by Naveen Raj and second accused and guided by both of them, SP9 and his team had proceeded to the house at No 8. At the said house, the second accused had shown to where the deceased's handphone was, at the side of the drain at the rear of the house. The handphone was marked as exh P31. The said handphone was wrapped with a black shirt brand 'Sport Way'. The second accused then showed a red shirt brand 'Island Kid' and marked as exh P39 worn by the second accused on the night of the robbery which had been washed at the rear

of he said house. The second accused later showed a handphone marked as exh P32 on the clothes rack in a room on the upper floor. Naveen Raj had shown SP9 to a blue 'T' shirt brand 'Cotton One' marked as exh P43 and a pair of shorts at the balcony marked as exh P45. SP9 then made a police report on the exhibits seized and marked as exh P22. At about 9.35am the same day, the first accused gave information to SP9 as to the location where he had thrown the coin box which was in the bush at the roadside along Jalan Laluan Tanjung 2, Taman Tanjung Emas, Batu 8, Ulu Kinta, Ipoh, Perak. SP9 made a police report of the discovery and marked as exh P30.

[58] The learned counsel submitted that with regard exh P18, the information was received at about 6.15am on 11 February 2015 but the report was only made at about 5.17pm on the same day.

[59] As regard exh P20, the information was received at 8.15am but the report was only made at 5.29pm on the same day.

[60] As regard exh P21, the information was received at 8.25am but the report was made at 5.35pm on the same day.

[61] As for exh P23 the information was received at 9.35am on 11 February 2015 but the report was made at 6.16pm on the same day.

[62] The learned counsel submitted that the police reports were made hours after the information was received from the accused.

[63] Learned counsel referred to *Hasamuddin bin Talena v Public Prosecutor* [2002] 2 MLJ 408; [2002] 2 CLJ 504 this court held as follows:

> The exact words of the two statements allegedly made by the appellant during his interrogation and at the place where the drugs were discovered respectively were not reduced into writing as soon as it was practicable to do so. In respect of the first statement, there was no excuse for the interrogator's failure to take down the questions put to and the responses received from the appellant either during the interrogation or immediately thereafter. In respect of the second statement, the interrogator should have put it down into writing in his diary as soon as he returned from the scene of the crime. The appellant's contention, which rested squarely on these two statements were therefor wholly unsafe.

[64] Learned counsel referred to exh P21 wherein SP9 had stated as follows:

> saya boleh tunjukkan dekat mana saya letak pakaian yang saya pakai semana samun itu. However in P22 SP9 stated 'semasa tiba di kawasan perayu tunjukkan sebuah telefon bimbit jenis Iphone 5 milik simati dan juga sebuah telefon bimbit jenama Samsung DUOS warna hitam'.

[65] Nevertheless, in cross-examination of SP9, it was stated that the accused did not say anything about the handphone and SP9 did not pose any question to the accused regarding the handphone.

[66] The learned counsel too submitted that failure on the part of the prosecution to tender the search list showing the exhibits which have been retrieved upon the statement furnished by the accused attracted the presumption of adverse inference under s 114(g) of the Evidence Act against the prosecution.

[67] The learned counsel urged the court to reject the admissibility of the evidence based on statement made pursuant to s 27 of the Evidence Act 1950 allegedly given by Naveen Raj, the first and second accused for the reasons that the statement was not reduced contemporaneously into writing but hours later.

[68] We are of the view that it is not fatal to the prosecution that the police reports were not made contemporaneously after been informed where the exhibits were but only made the incriminating exhibit were found. It makes sense for the report to be made after the incriminating exhibits were discovered because if the reports were made contemporaneously soon after the information was received and no exhibits were found, making a police report earlier would be futile. In the instant case the police reports were made within 24 hours from the time the information was informed to SP9 by the accused and upon discovery of the exhibits.

[69] The prosecution on the other hand, submitted that the exhibits were discovered based on information given by the first and second accused and Naveen Raj in the course of investigation. The learned deputy averred that had it not for the information given, the exhibits would not have been found. It was further argued that the fact no questions were posed to the accused by the police with regard to the exhibits, does not mean that the information given by the accused could not be admitted by court.

[70] The learned trial judge in allowing that the information furnished by Naveen Raj, the first and second accused leading to the discovery of the incriminating exhibits was by reference to the evidence of SP9, the investigating officer. The learned trial judge considered the evidence of SP9, whereby he had explained that in the course of the investigation on 11 February 2015, Naveen Raj had provided vital information leading to the discovery of exhibits stolen from the deceased's house and the clothes worn by him. Similarly, the second accused had also in the course of police investigation provided vital information to SP9 with regard to the clothes he wore on the night of the incident. The learned trial judge went on further to explain that based on information received from Naveen Raj and the second accused, SP9

had proceeded to an address at No 8. At the said house, the second accused hand shown SP9 the hand phone (exh P31) at the side of the drain at the rear of the house. SP9 had also retrieved other exhibits based on the information furnished by Naveen Raj and the first accused as alluded earlier in this judgment.

[71] In discussing whether how much of the information received from the accused may be proved, it is instructive to know the provision of s 27 of the Evidence Act which states as follows:

> 27(1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of the information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[72] In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630, the Federal Court held, inter alia:

> [28] In the light of the authorities referred to, we hold that information admissible under s 27 of the Evidence Act includes accused's statement, or his act or conduct such as pointing out which leads distinctly to the discovery of a fact. For such information to be admissible in evidence, there is no duty on the prosecution to prove the voluntariness of the information. Hence it is not necessary to conduct a trial within a trial to determine the voluntariness of the information.

[73] Hence, we are not with the learned counsel before us on the proposition that the information furnished by the accused to the police in the course of police investigation must be made voluntarily. Learned counsel referred to the Federal Court case of *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829 where it is held that if the information was involuntarily given by the accused, the court has the discretion to reject its admissibility which depends on the facts of each case.

[74] In *Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 389, the court has had the opportunity to analyse the admissibility of statements given to the police in the course of investigation and had this to say and observe:

> On 23 or 24 August 1994 PW4 gave a statement to the police. On 26 August 1994 he and the accused were arrested. In the course of the investigation the accused supplied certain information to the police which led to the discovery of some exhibits in this case. He told ASP Mohd Sabri bin Muhammad (PW17) 'Tanam kepala Ali di kebun kelapa sawit Charuk Putting'. PW17 recorder this statement on a piece of paper. It was signed by him and the accused. It was marked as exh P46A without any objection from the defence. Later the accused led PW17 and a police party to a spot along Jalan Maran. There the accused told PW17 'Disini lah saya buang parang, rotan dan seluar Ali'. The rattan cane and the trousers were recovered. At another spot the accused told PW17, 'Sinilah tempat saya tanam

kepala Ali'. The head was found there. At a little distance away the accused told PW17, 'Sinilah tempat buang plastic isi kepala Ali'. A black plastic container was found there. PW17 recorded the three statements made in a police report. It was admitted without any objection from the defence and marked as exhs P50A, P50B and P50 C.

[75] In admitting the statement by the accused to the police in the course of police investigation, there are obviously criteria which should be observed. This is stated in *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78 where the court held as follows:

... What was the fact discovered? The fact discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to this. What was the information supplied by the accused relating distinctly to the facts thereby discovered? It was 'information with regard to a firearm and some ammunition which he had hidden in the Berapit Hills in Bukit Mertajam'. In the words of Mr Ong, all that evidence is admissible ...

[76] The learned trial judge observed that in the instant case, based on the location where the incriminating exhibits were found, it could not have been found had it not for the information furnished by the accused. We agreed with the views expressed by the learned trial judge on his observation on this issue and that the name 'Sathia' referred to the second accused herein.

[77] It is our considered opinion that the information furnished which led to the discovery of the incriminating exhibits showed the involvement of the first and second accused in the murder of the deceased. As such we agreed with the finding of the learned trial judge that the information given by the first and second accused to SP9 is admissible as evidence for the prosecution pursuant to s 27 of the Evidence Act 1950.

Separate issue by first accused

[78] For the first accused, (Devapraghasan all Saravanan) it relates to the failure by the investigating officer, SP14 to investigate the alibi notice issued by him. The notice of alibi is marked as D121 and is reproduce herein.

NOTIS PEMBELAAN ALIBI

AMBIL PERHATIAN bahawa tertuduh, Devepraghashan a/l Saravanan bercadang untuk mengemukakan pembelian Alibi perkara ini pada masa perbicaraan kes.

Tertuduh, Devepraghasan a/l Saravanan menyatakan pada hari kejadian iaitu pada 11 hb Februari, 2015, jam lebih kurang antara 11.00 malam hingga 4.00 pagi beliau berada di EQ MAX Video Centre yang beralamat di No: 46, Susuran Perpaduan, Taman Perpaduan Jaya, 31150, Ulu Kinta, Perak Bertarikh pada 23 haribulan Oktober 2017

Peguambela bagi Tertuduh

[79] The learned counsel for the first accused averred that the first accused was on 11 February 2015 at about 11pm until 4am at EQ MAX Video Centre at No 46, Susuran Perpaduan, Taman Perpaduan Jaya, Ulu Kinta, Perak.

[80] The first accused in his evidence stated that on 11 December 2015 he arrived at EQ Mex Video Centre at about 11.30pm and remained thereat until 5am. He then went home and on his way home he was stopped by policemen who conducted a body search on him. Finding nothing incriminating on him, he was released. He then stopped at a mamak shop near his house. At the mamak shop he saw many policemen because there was a murder. He was preventing by the police from using the back lane and was told to use the front lane which he did. He was then arrested and taken to the Tanjung Rambutan police station. He was assaulted by the police and the police said he had committed burglary.

[81] In cross-examination of SP14 by the learned counsel for the first accused SP14 stated that she did not go to Video EQ Max to investigate and to verify that the first accused was at the place and at the time as stated in the alibi notice. Furthermore SP14 stated that she was not given a copy of D121.

[82] The prosecution submit that the notice of alibi (D121) did not state the names of any witnesses whom could confirm and corroborate the alibi evidence. Pursuant to s 402A(4) of the CPC which states as follows:

> 402A (4) The notice required under this section shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[83] The learned trial judge did refer to the alibi evidence of the first accused in his judgment at paras 34–35 of his judgment where His Lordship states as follows:

> [34] Seterusnya, OKT 1 mengatakan dia berjalan kaki pergi ke siber cafe EQ Max. Di dalam perjalanan kesana, dia mengeluarkan wang daripada tabung yang diberikan oleh simati. Tabung itu dia buang di tepi jalan. OKT 1 mendakwa dia berada disiber cafe itu sehingga 5.00 pagi. Didalam perjalanan pulang OKT 1 dia telah ditahan dan diperiksa oleh anggota polis. OKT 1 telah ditahan dan diperiksa oleh anggota polis. OKT 1 dibenarkan meneruskan perjalan. OKT 1 mengatakan dia tidak terus pulang ke rumah. Dia pergi ke sebuah kedai mamak. Di kedai itu, pekerja kedai tersebut memberitahu OKT 1 bahawa kehadiran polis yang ramai di kawasan tersebut ialah kerana telah berlaku (1) kes pembunuhan. OKT 1 pulang ke rumah ikut jalan belakang. Dia Ielah difarang oleh polis dan disuruh menggunakan jalan depan. Ketika di jalan depan (2) anggota polis Ielah menangkap nya. Semasa

di dalam tahanan OKT 1 mendakwa dirinya Ielah dipukul. Dia di paksa mengaku melakukan pecah rumah.

[35] Peguambela OKT 1 ada memberikan notis alibi (eks 121). Di dalam notis itu OKT 1 mendakwa dia berada di siber cafe EQ Max Video Centra pada masa si mati dikatakan telah dibunuh. OKT1 tidak memanggil mana-mana saksi untuk menyokong notis alibi itu.

[84] The court on this issue is guided by the observation of the Federal Court in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 MLJ 617 and can do no better but to quote in extenso the relevant passages of the judgment:

[35] In Malaysia this plea of alibi, which is more a rule of evidence rather than a defence in the normal sense, together with the burden placed on the person who assets that he was elsewhere, can be found in the Evidence Act 1950. Section 11 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable. Under illustration (a) whether A committed a crime on a certain day and the fact that he was somewhere else is relevant. Therefore if an accused person, in this case the first respondent, states that he was somewhere else ie he was not at the scene of crime that inconsistent fact is relevant. If successful in establishing his alibi his acquittal should be assured as he could not have committed a crime when he was physically away from the scene of crime.

[37] The burden of proving the commission of an offence by an accused person never shifts away from the prosecution whilst the burden of establishing that defence of alibi lies on the accused person.

[38] Mere service of a notice of alibi on the prosecution is not sufficient to substantiate the truth of such notice even though an accused person does not assume the burden of proving its truth. The burden is still on the prosecution to prove its falsity by eventually establishing the presence of the accused person of having been at the scene of the crime at the material time. The falsity of that notice will crystallise once the prosecution successfully establishes a prima facie case.

[85] In the instant case, the learned trial judge had evaluated the other evidence when considering whether the first accused had succeeded in his alibi defence by reference to the presence of the first accused saliva on the cup exh P56B which was found in the deceased's bedroom. The learned trial judge also relied on the discovery of the coin box, mobile phone belonging to SP8 all of which were admitted pursuant to s 27 of the Evidence Act. The learned trial judge had also considered the evidence of SP8 that the first accused worked as a house-keeper in the deceased's homestay. The learned trial judge had also considered the presence of the blood DNA on the shirt (exh P96A) and trouser (exh P98B) belonging to the first accused. The learned trial judge after evaluating all the evidence ruled that the first accused had failed to prove on the

balance of probability the alibi defence that he was at the cybercafe EQ Max at the time as stated in the charge sheet. The court was also of the view that SP14 could not have possibly investigated whether the first accused was at the cybercafe on the night of the incident because no names and addresses were mentioned in the notice of alibi to enable SP14 to check on them as required under s 402A(4) of the CPC for purposes of establishing his alibi. No adverse inference could be cast on SP14 for failure to investigate.

Separate issue by second accused

[86] For the second accused, (Nagarujun a/l Arjunan), it relates to the corrective report pursuant to s 399 of the CPC by SP6 with regard to the finger-print report which is contrary to ss 91 and 92 of the Evidence Act 1950.

[87] The learned counsel submit that the prosecution had relied on the finger print report (exh P13) prepared by SP6, the Assistant Registrar of Criminals, Bukit Aman pursuant to s 399 of the CPC which states that the finger print uplifting on exh C9 matched with the finger-print of the second accused. However, in exh P13, at para 7 thereof, SP6 had stated as follows:

> 7. Dengan itu, saya mengesahkan bahawa kedua-dua cap jari yang dibandingkan itu adalah serupa iaitu ibu jari kanan dipunyai oleh seorang dan orang yang sama iaitu Mohd Ghazali b Waspi, KPT: 581025-08-6487.

[88] Before SP6 testified in court, he had corrected the mistake which was apparent in para 7 of the report by stating that the name 'Mohd Ghazali b Waspi. KPT: 581025-08-6487' should have been 'Nagarujun a/l Arjunan KPT: 960117-05-5469'. SP6 explained that he only realised the mistake in exh P13 on the day before he testified. SP6 further explained that he had 'copy paste and had forgotten to delete'.

[89] The learned counsel objected to SP6 correcting the mistake in exh P13 by reference to ss 91 and 92 of the Evidence Act 1950 which states that 'no evidence can be given in proof of any matter which is required by law to be reduced in the form of a document and exclude oral evidence for the purpose of contradicting, varying, adding to or subtracting from its terms'.

[90] Learned counsel cited the case of *Inspector General of Police v Alan Noor bin Kamat* [1988] 1 MLJ 260 Supreme Court which held:

> [2] Oral evidence should not have been acted upon because it is clear that s 91 of the Evidence Act, no evidence can be given in proof of any matter which is required by law to be reduced in the form of a document and section 92 prohibits the giving of oral evidence to contradict or vary or explain the terms of such document.

[91] The court observed that the learned deputy before the learned trial judge and before us did not advance any argument in the written submission on whether SP6 could correct the mistake in exh P13 by oral evidence. We also noted that the learned trial had also not referred to this issue in his judgment.

[92] It is our considered view that the impugned words in exh P13 referred to by learned counsel did not affect the proprietary of the whole report when it is viewed against the totality and entirety of the testimony of SP6. The words at para 7 in exh P13 albeit after the correction was made, supported the oral evidence of SP6 that the finger print in C9 matched with the finger print of the second accused. The oral evidence of SP6 is the substantive evidence, while exh P13 is nothing more than corroborative evidence affirming the oral testimony of SP6 which he had conducted the finger print analysis in C9 with the records kept by him at the Central Registry of Criminals and held that it matched with the finger print of the second accused (see *Public Prosecutor v Nolose Albert Raleshome* [2016] 7 MLJevi 17). To displace SP6's evidence on exh P13, the defence must call for rebuttal evidence, which in the instant case was none.

[93] In this regard, we are of the view that there is an obvious error in para 7 of exh P13. The prosecution cannot ask the court to assume that the name appearing in para 7 was a typo error as only the maker of the document ie SP6 would be able to clarify this. The prosecution had called SP6 to explain the error and rightly SP6 said it was a copy paste and he had forgotten to delete it. The court accepted it as a plausible explanation. We found no error on the part of the learned trial judge to rely on the finger-print report of SP6 to implicate the second accused to the crime.

[94] For the sake of completeness, the court shall also address the other salient issues raise in the petition of appeal and relevant to this appeal.

Common intention

[95] In a criminal prosecution, it is not incumbent upon the prosecution to prove the motive for a crime. Motive would be probably become relevant if the prosecution's case rested essentially on circumstantial evidence as shown it was not the case herein. Motive become less significant or no longer relevant if there was an eyewitness or where there was direct evidence from which the element of mens rea could manifestly be said to be present. One must also appreciate that the element of intention is to be differentiated from motive as if shown it existed it would strengthen that an intention to commit an offence exists. The absence of motive need not necessarily indicate the absence of intention as well. The above proposition was well said by the Singapore Supreme Court in *Public Prosecutor v Oh Laye Koh* (1994) 2 SLR 385 as follows:

The element of intention is to be distinguished from 'motive' even-though the

presence of a motive may bolster the inference that an intention to commit the offence was existent. The absence of motive, however, need not necessarily mean that no intention was present.

[96] In the instant case, the first and second accused were alleged to have committed the offence in furtherance of their common intention pursuant to s 34 of the Penal Code. It was incumbent upon the prosecution in addition to the above requirements, to also prove that the criminal act was done by the first and second accused in furtherance of their common intention. It was the evidence of SP2 that the death of the deceased was caused by the bodily injuries sustained by her and the act of inflicting such bodily injuries committed was sufficient in the ordinary course of nature to cause death bringing their act within s 300(c) of the Penal Code. The critical question which arose herein was whether it was the first and second accused who had inflicted those bodily injuries by which the deceased succumbed to her death. As far as evidence of common intention, the prosecution had succeeded in proving that the first and second accused were seen together at the scene of the crime inflicting the bodily injuries to the deceased. There was also evidence of planning by the first and second accused to commit burglary at the deceased's house on the night of the incident.

CIRCUMSTANTIAL EVIDENCE

[97] The learned trial judge had meticulously combed the evidence before him on the basis of circumstantial evidence and had come to the correct finding that the irresistible conclusion points to the first and second accused having committed the offence. The learned trial judge relied on exh P128. the chemist report analysed by SP11, the finger-print report by SP6 and also the evidence of SP10 to form his opinion that it was the first and second accused who had committed the murder. It was the finding of the learned trial judge that Naveen Raj, the first and second accused had committed burglary at the deceased's house on the fateful night of the incident at the address and time as stipulated in the charge. The learned trial judge had rejected the first accused alibi defence. From the contents in exh P128, it was revealed that the first and second accused had entered the deceased's house through the kitchen door. Once inside the deceased's house, both of them entered the deceased's bedroom and had caused cause bodily injury to the deceased which in the ordinary cause of nature to cause death.

[98] The court was fully appraised of the fact that there was no eye-witness who saw the accused stabbed the deceased on the neck which led to the deceased death but there was an eye witness who saw both the first and second accused entered the house through the rear door. Naveen Raj saw it. The court relied on the statement in exhs P128 and SP10 to form an opinion that it was

the first and second accused who had robbed the deceased of the mobile phones and the coin box. SP10's evidence was circumstantial in nature as he did not witness first and second accused struck the fatal stabbing on to the deceased's neck. His evidence was circumstantial in nature. Circumstantial evidence is evidence of relevant facts from which the existence or non-existence of facts in issue may be inferred. Section 5 of the Evidence Act 1950 provides that if the evidence is relevant then it is admissible. Furthermore there was evidence of first and second accused planning to burglar the deceased's house as admissible.

[99] In *Yeap Boon Hai v Public Prosecutor* [2009] 5 MLJ 406; [2010] 2 CLJ 388, the court relied fully on the circumstantial evidence in convicting the accused of murder by setting fire to the family home. Among the circumstantial evidence were the neighbour living opposite the accused saw him ascending the staircase alone at 3.50am in the morning; the petrol station attendant said the accused had earlier bought petrol with four empty plastic containers; the accused brother's and sister-in-law testified that the accused argued with his wife when she asked for a divorce; the neighbour next door heard them quarrel at about 3.30am; a chemist testified that the liquid which was in the plastic containers was petrol which had in fact evaporated; the officers of the fire department testified that the fire was started with inflammable liquid such as petrol and the pathologist testified that the cause of death was smoke inhalation.

[100] In *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195, the appellant was charged and convicted of the murder of his girlfriend despite the fact that the body of the deceased was never discovered. The facts adduced by the prosecution were so compelling that the court reached the irresistible conclusion that the appellant had murdered the deceased. The appellate court referred to two passages with approval in the judgment of the trial judge as follows:

> The second question to which I must draw your attention is that the question in this case, depending as it does on the circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — 'was it an accident'

The second passage is as follows:

> Now as I told you earlier on, one of the points about circumstantial evidence is the cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them, not merely each one in itself, but altogether, does it or does it not lead you to irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts.

A The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that is was the accused who intentionally caused the death of this young girl

B **[101]** In *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307 the court held that in cases where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the accused?

C **[102]** In the instant case, it is our judgment that the learned trial judge had correctly relied on the circumstantial evidence that the first and second accused did commit the murder at the deceased's house as highly plausible. The court believed the testimonies of SP10 and the documentary evidence namely the D chemist report and finger-print report as compared to the evidence of the first and second accused. The evidence adduced before the court points to an irresistible inference and conclusion that the first and second accused committed the offence of murder.

E APPEAL ON SENTENCE

[103] In the instant appeal, the facts revealed that the first accused was 16 years of age at the time when the offence was committed and by definition the first accused is considered as a 'child'. The learned trial judge had invoked F s 97(1) of the Child Act 2001 where it states inter alia that 'capital punishment may not be applied to children. Sections 97(2), (3) and (4) make provisions for alternative punishments for offences which would result in death penalty if committed by a child, namely detention at the pleasure of the Ruler of the State'. Hence the first accused, has been ordered to be detained at the pleasure G of HRH the Sultan of Perak.

[104] As for the second accused, he was at the age of 19 years old at the time of the commission of the offence, being a youthful offender, there is no law H which prohibits the court from sentencing him to death by hanging for the offence he had committed. Hence the trial judge had sentenced the second accused to death by hanging.

CONCLUSION

I **[105]** In the upshot, we having perused the appeal records, the grounds of judgment and the written submissions by parties and we accused is safe. We dismissed both appeals by the first and second accused and affirmed the decision of the learned trial judge.

Appeals dismissed, decision of the trial judge affirmed.

Reported by Ashok Kumar